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No. 86-1493

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE BANK OF INDIA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL 6, INTERNATIONAL FEDERATION OF HEALTH PROFESSIONALS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board is barred from asserting jurisdiction over petitioner, a bank that is engaged in commercial banking operations in the United States and whose employees reside in the United States, solely because petitioner is owned by a foreign government.

2. Whether the Board abused its discretion by declining to hold a hearing on petitioner's claim that the results of a representation election should be set aside because a single allegedly racially inflammatory statement was made by the union during the course of the election campaign.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 808 F.2d 526. The decisions and orders of the National Labor Relations Board (Pet. App. A33-A47) are reported at 273 N.L.R.B. 264 and 267.

JURISDICTION

The judgment of the court of appeals (Pet. App. A48-A49) was entered on December 11, 1986. The petition for a writ of certiorari was filed on March 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was nationalized and incorporated in India by the State Bank of India Act of 1955. The Reserve Bank of India, a wholly-owned and controlled agency of

the Government of India, owns more than 92% of petitioner's stock. Petitioner acts as an agent for the Reserve Bank of India in places in which the Reserve Bank is not established. Pet. App. A7-A8.

Petitioner maintains branch offices in New York and Chicago, as well as an agency in Los Angeles. The branch offices offer the public general banking services, such as checking and savings accounts, commercial loans, letters of credit, and foreign currency exchange. Petitioner's operations in the United States are subject to regulation under federal and state banking and tax laws. Petitioner's United States deposits are insured by the Federal Deposit Insurance Corporation. Pet. App. A8-A9.

Upper-level management personnel at petitioner's branch offices are assigned to their positions in the United States on a temporary basis. Other branch employees are hired locally. Pet. App. A8-A9.[1] Petitioner's International Division, which is located in Bombay, India, makes all policy decisions concerning petitioner's foreign operations, but local branch managers are responsible for day-to-day operations and local personnel decisions, including the hiring and firing of employees. Moreover, local branch managers provide the International Division with recommendations concerning hours of operation for United States branches, fringe benefits for employees, staffing levels, conditions of employment, and other matters typically addressed in employment contracts. These recommendations are given "great weight" by the International Division (*ibid.*). The personnel practices of petitioner's United States branches are substantially based on the customary practices of domestic commercial banks. *Ibid.*; C.A. App. 119, 161-162, 167.

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[1] A substantial proportion of the non-managerial employees at petitioner's United States branches are American citizens. Most of the other employees are awaiting naturalization. Pet. App. A4 n.2.

In July 1982, Local 6 of the International Federation of Health Professionals petitioned the National Labor Relations Board for a representation election at petitioner's New York branch. Petitioner consented to the election, subject to its contention that the Board lacked jurisdiction over petitioner's United States operations or, alternatively, that the Board should decline to assert such jurisdiction. The union won the representation election. Petitioner then filed an objection asserting that the results of the election should be set aside because the election had been tainted by an allegedly racist statement contained in a letter sent to employees by the union.[2] The Board's regional director found that the union's statement did not warrant setting aside the election; he therefore concluded that a hearing on the truthfulness of the statement was not required. The Board adopted the regional director's recommendation and certified the union as the representative of the clerical employees at petitioner's New York branch. Pet. App. A28-A29, A34-A35.[3]

Petitioner refused the union's request to bargain and unilaterally granted a wage increase to the affected employees. The union filed unfair labor practice charges with the Board's General Counsel, who issued complaints alleging that the Bank had violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5), by refusing to bargain with the union and by granting a wage increase without notice to or bargaining with the union.

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[2] The letter stated that petitioner was "trying to keep depressed conditions and low wages for its employees, because most of you are of Indian nationality and other minority groups" (Pet. App. A30).

[3] The Board also found that a hearing was not warranted by petitioner's claims that the union distributed an altered memorandum signed by petitioner's president and that union supporters had defaced an election notice. See. Pet. App. A22-A29, A34-A35.

The Board held that petitioner had engaged in the unfair labor practices (Pet. App. A33-A47). It first considered petitioner's claim that it was not subject to the Board's jurisdiction. The Board noted that it had addressed and rejected the same jurisdictional arguments in *State Bank of India* (*State Bank I*), 229 N.L.R.B. 838 (1977).[4] Holding

[4] In *State Bank I*, the Board asserted jurisdiction over petitioner and directed that a representation election be held among the employees in petitioner's Chicago branch. The Board first determined that it had the "statutory power" to assert jurisdiction over petitioner because petitioner operated in interstate commerce and did not fall within any express limitation upon the Board's authority (229 N.L.R.B. at 841-842). The Board noted that petitioner based its claim of immunity upon this Court's decision in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). In *McCulloch*, the Court held that alien crews working on foreign-flag vessels were not subject to the requirements of the Act, even while vessels were within American waters. The Board stated that *McCulloch* did not determine "the issue of [the Board's authority over] foreign governments or their agents as employers doing business within the Territorial United States" (229 N.L.R.B. at 841). It concluded that "there is no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act" (*ibid.*).

The Board next considered whether it should exercise its discretion not to assert jurisdiction over petitioner's employees, noting that it previously had "deemed it inappropriate to assert jurisdiction affecting certain employees working in the United States for an American corporation 'because that employer was a wholly owned subsidiary of . . . an agency' of a foreign government" (229 N.L.R.B. at 841-842 (footnote omitted)). Overruling *AGIP, USA, Inc.*, 196 N.L.R.B. 1144 (1972), and *British Rail-International, Inc.*, 163 N.L.R.B. 721 (1967), in which it had declined to exercise jurisdiction on that basis, the Board determined that "it will better effectuate the policies of the Act for the Board to assert, rather than in our discretion decline, jurisdiction in any case involving employees employed within the territorial jurisdiction of the United States by any 'agency' or 'instrumentality' of a foreign state, engaged in commercial activity which meets the Board's jurisdictional standards for such enterprises" (229 N.L.R.B. at 842). The Board found the exercise of its jurisdiction warranted in

that its prior decision controlled this case, the Board concluded that petitioner was subject to its jurisdiction (*id.* at A35 n.5, A42). The Board next declined to reconsider its prior determination that petitioner was not entitled to an evidentiary hearing on its objection to the representation election (*id.* at A35). The Board ordered petitioner to bargain with the union and to cease and desist from making unilateral changes in its employees' wages (*id.* at A38, A45).

2. The court of appeals unanimously enforced the Board's orders (Pet. App. A1-A32). The court noted that "[t]he language of the NLRA § 2(2) on its face clearly vests jurisdiction in the Board over 'any' employer doing business in this country save those Congress excepted with careful particularity" (*id.* at A10 (footnote omitted)). The court found no inconsistency between the Board's exercise of jurisdiction over petitioner's United States employees and this Court's determination in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), that the National Labor Relations Act did not apply to citizens of other nations working on foreign-flag

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light of the increasing nationalization of industry abroad and the influx of such nationalized businesses into this country (*id.* at 839, 841-842). The Board also noted the then-recent enactment of the Foreign Sovereign Immunities Act of 1976. Although that statute defines an instrumentality of a "foreign state" to include a corporation owned by a foreign state or political subdivision thereof, it denies such instrumentalities the protection of sovereign immunity in any action growing out of a "commercial activity" carried on in the United States. The Board recognized that the statute provided for judicial, rather than administrative, determinations of immunity, but found in the statute's enactment "further support for [the] decision to treat foreign state enterprises coming within [the Board's] jurisdiction as [it] would private individuals under like circumstances." 229 N.L.R.B. at 842 (footnote omitted).

vessels (*id.* at A12-A15). The court of appeals explained (*id.* at A14 (footnote omitted)):

> In contrast to the foreign * * * crewmen involved in *Benz* and *McCulloch*, the record establishes that [petitioner] is doing business in the United States * * *. Further, unlike the foreign employees in *Benz* and *McCulloch* who were only temporarily located in the United States, most of [petitioner's] employees in its United States offices are American citizens or American residents awaiting naturalization. Because these employees live and work in the United States and are subject to the obligations and responsibilities of American citizens, they are at the same time entitled to the protections and benefits our nation provides through its laws.

The court observed that petitioner's employees "are more appropriately compared to the American employees involved in *International Longshoremen's Ass'n, Local 1416, AFL-CIO* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), where the Supreme Court held that American residents who were employed by a foreign flag ship to do longshoremen's work were covered by the NLRA" (Pet. App. A14).[5]

The court of appeals rejected petitioner's argument that the Board's exercise of jurisdiction would interfere with the monetary policy of the Government of India. "While it is true that the NLRA exempts the United States federal reserve banks from its jurisdiction," the court stated, peti-

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[5] The court of appeals found that *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), "affirms the Board's position" (Pet. App. A12). It explained that this Court, in *Catholic Bishop*, "did not conclude that there were exceptions to the employers covered by the [Act] other than those expressly excepted by Congress," but rather held that the statute should be interpreted "to exclude any employer whose inclusion within the NLRA would violate the constitution" (*ibid.*). The court of appeals noted that petitioner "does not argue that it is a constitutionally problematic employer within the meaning of *Catholic Bishop*" (*ibid.*).

tioner "is not itself a reserve bank but rather a bank that acts on occasion as the agent of a foreign reserve bank" (Pet. App. A16). The court found no basis in the statute or its legislative history for giving petitioner an exemption from the NLRA not available to the United States banks with which petitioner competes.[6]

The court also upheld the Board's 1977 decision to reverse its prior policy of declining to assert jurisdiction over commercial activities within the United States of companies owned by foreign governments. It found "no basis for disagreeing with" the Board's conclusion that "asserting jurisdiction over [petitioner] would effectuate the purposes of the NLRA given the expanded commercial activities of foreign government-owned employers like [petitioner] in our country, and the increasing number of American resident employees hired by them" (Pet. App. A22).

Finally, the court rejected petitioner's assertion that it was entitled to an evidentiary hearing on its contention that the union engaged in racially inflammatory conduct during the election campaign. The court agreed with the Board that the union's statement could not properly be characterized as racially inflammatory. It noted that "[a]lthough the Union's statement here had 'racial overtones,' the statement was relevant to the working conditions and wages of the employees the union sought to represent" (Pet. App. A31).

The court also noted that the alleged racism was not "sufficiently close to the core theme of the campaign" (Pet. App. A31). It stated that "[t]he * * * remark was a single sentence at the end of a long letter urging support for the union. This long letter in turn was one of many communications from the union to the employees presenting

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[6] The court also rejected petitioner's claim that the Foreign Sovereign Immunities Act precluded the Board's exercise of jurisdiction (Pet. App. A16-A18).

reasons for voting for the union" (*ibid.*). For these reasons, the court of appeals upheld the Board's conclusion that petitioner "failed to establish a *prima facie* case of racially inflammatory conduct and therefore was not entitled to a hearing" (*id.* at A32).[7]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. The National Labor Relations Act vests the National Labor Relations Board with the "fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226 (1963) (emphasis in originial); see also *Polish Alliance* v. *NLRB*, 322 U.S. 643, 647-648 (1944). Nothing in the statute or its legislative history indicates that Congress intended to exempt from the Board's jurisdiction all companies owned by foreign nations. Compare 29 U.S.C. 152(2) (express statutory exclusions); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 283-284 (1974) (finding specific legislative history indicating that Congress did not intend to subject managerial employees to the Board's authority). The conclusion is therefore inescapable that petitioner is subject to the statutory jurisdiction of the Board.

Petitioner argues (Pet. 8-9) that a contrary result is mandated by this Court's decisions in *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). The Court held in those cases that the Act does not extend to "labor disputes between nationals

[7] The court upheld the Board's determination that petitioner's other objections to the election did not necessitate an evidentiary hearing (Pet. App. A22-A29).

of other countries operating ships under foreign laws." 353 U.S. at 143 (footnote omitted); see also 372 U.S. at 17-22. The Court stated that "[t]he whole background of the [National Labor Relations] Act is concerned with industrial strife between American employers and employees," and concluded that "the boundaries of the Act" include "only the workingmen of our own country and its possessions" (353 U.S. at 143-144).

Benz and *McCulloch* plainly do not bar the Board from exercising jurisdiction over foreign employers operating within the United States. They concern only the "maritime operations of foreign-flag ships employing alien seamen." *McCulloch*, 372 U.S. at 13; see also *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24, 27 (1963). Indeed, this Court already has recognized that those decisions establish an extremely narrow rule, holding that the Act *does* extend to American residents who perform longshore work in the United States for the owners of a foreign vessel. These workers were subject to the Act, the Court found, because their duties did not involve "any internal affairs of either ship which would be governed by foreign law." *International Longshoremen's Ass'n, Local 1416, AFL-CIO* v. *Ariadne Shipping Co.*, 397 U.S. 195, 199 (1970) (footnote omitted); see also *International Longshoremen's Ass'n* v. *Allied International, Inc.*, 456 U.S. 212, 219-220 (1982) (*Benz* line of cases relates to maritime operations of foreign-flag vessels).

The court of appeals correctly concluded (Pet. App. A14 (footnote omitted)) that petitioner's employees "are more appropriately compared to the American employees involved in [*Ariadne*]" because, "unlike the foreign employees in *Benz* and *McCulloch* who were only temporarily located in the United States, most of [petitioner's] employees in its United States offices are American citizens or American residents awaiting naturalization." As in *Ariadne*, "the labor dispute centers on the wages to be paid American residents, foreign or natural, who do

non-managerial work for a foreign concern engaged in a commercial enterprise in this country" (Pet. App. A15). *Benz* simply does not apply in the present situation.[8]

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[8] Petitioner's contrary argument is based upon an excerpt from the opinion in *Benz*. The Court there stated that it previously had relied on the absence of express congressional intent in declining to extend other statutes regulating seamen's wages to cover foreign seamen on foreign vessels, and that a "storm of diplomatic protest" had resulted when Congress considered proposals to broaden those statutes (353 U.S. at 146). Observing that the seamen in *Benz* had "agreed in Germany to work on the foreign ship under British articles," the Court declined to "read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." 353 U.S. at 146-147; see also 372 U.S. at 17-22. That comment obviously must be read in the context of *Benz*, where the question before the Court was whether United States law would override the law that otherwise governed conduct aboard a foreign vessel. As its subsequent decision in *Ariadne* makes clear, the Court did not hold, or suggest, that the Act does not apply in any situation in which foreign policy concerns might possibly be implicated.

Indeed, under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, the National Mediation Board (NMB) does not assert jurisdiction over foreign based flight crews of foreign air carriers. However, the NMB routinely exercises jurisdiction over ground employees working in the United States who are employed by air carriers wholly or substantially owned by foreign states. See, *e.g.*, *Aerovias Venzalanes*, 9 N.M.B. 364 (1982) (certifying the International Association of Machinists and Aerospace Workers (IAM) as the representative of the carrier's U.S. office and clerical workers); *Iran National Airlines*, 7 N.M.B. 245 (1980) (certifying the International Brotherhood of Teamsters as the representative of the carrier's U.S. passenger service agents); *Iberia Airlines of Spain*, 7 N.M.B. 256 (1980) (discussing 1973 certification of the IAM as the representative of the carrier's U.S. office, clerical, fleet and passenger service employees).

Indeed, petitioner's claim (Pet. 9-10) that the Board's exercise of jurisdiction would threaten "the sensitive area of foreign relations" is undercut by the fact that petitioner's operations are regulated by a host of state and federal laws, such as statutes regulating the banking industry. Petitioner's speculation concerning possible disruptions of "international monetary policy" and "retaliatory action" by the Indian Government appears directed at obtaining a broad exemption from the labor laws for any company owned by a foreign government. Nothing in the National Labor Relations Act justifies that result. Instead, Congress's determination—embodied in the Foreign Sovereign Immunities Act—that sovereign immunity does not shield the commercial activities of foreign governments, entirely undercuts petitioner's position. See Pet. App. A16-A18.[9]

Petitioner next contends (Pet. 10-11) that the statutory exclusion of "Federal Reserve Banks" (29 U.S.C. 152(2)) indicates that Congress intended that all "agencies with expertise in monetary policy be free from interference by the Board." First, as the court of appeals found (Pet. App. A15-A16), it is petitioner's parent, the Reserve Bank of India, that is the equivalent of a Federal Reserve Bank. Petitioner's activities are comparable to those of the United States banks that are members of the Federal Reserve System, and all of those banks are subject to the Board's jurisdiction. Second, Congress excluded only "Federal Reserve Banks" from the Board's jurisdiction. Petitioner's claim that foreign banks deserve similar treatment is therefore properly addressed to Congress.

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[9] Petitioner's assertion (Pet. 12) that the Board improperly relied on the Foreign Sovereign Immunities Act is frivolous. The Board did not usurp the jurisdiction of the courts to decide questions of sovereign immunity, but simply noted that provisions of that Act confirmed the Board's interpretation of its own jurisdiction. See *State Bank I*, 229 N.L.R.B. at 841; *S K Products Corp.*, 230 N.L.R.B. 1211, 1213 (1977).

Finally, petitioner is plainly wrong in asserting (Pet. 11-12) that the Board abused its discretion by asserting jurisdiction in the circumstances of this case. The Board clearly articulated the policy considerations underlying its 1977 decision to assert jurisdiction over commercial activities within the United States of instrumentalities of foreign governments. *State Bank I,* 229 N.L.R.B. at 839, 841-842; see also *S K Products Corp.,* 230 N.L.R.B. 1211 (1977). The court of appeals correctly held (Pet. App. A19) that the Board's decision was justified by "the fact that foreign banks were increasingly involved in American markets, and that more American residents were being employed by those foreign banks"; because "circumstances had changed substantially since [the Board's] earlier decision[]," the Board was entitled to alter its policy.

2. The court of appeals correctly rejected petitioner's contention that the Board should have held an evidentiary hearing concerning petitioner's objection to the union's allegedly racially inflammatory campaign statement.

The Board has broad authority to regulate conduct relating to representation elections. See *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). When campaign literature contains material that is intentionally racially inflammatory, the Board will set aside the election results. *Sewell Manufacturing Co.,* 138 N.L.R.B. 66, 71-72 (1962). When the challenged statements are found not to be racially inflammatory, either because the statements are isolated or because the racial references are temperate or germane to the campaign, the Board instead applies its general rule that it "will not set elections aside on the basis of misleading campaign statements." *Midland National Life Insurance Co.,* 263 N.L.R.B. 127, 133 (1982) (footnote omitted); see also Pet. App. A29-A31; *Peerless of America, Inc.* v. *NLRB,* 576 F.2d 119, 125 (7th Cir. 1978); *Bancroft Manufacturing Co.,* 210 N.L.R.B. 1007 (1974); *Hobco Manufacturing Co.,* 164 N.L.R.B. 862 (1967);

Archer Laundry Co., 150 N.L.R.B. 1427 (1965). Finally, under Board rules, a party raising objections to an election is entitled to an evidentiary hearing only if it has raised "substantial and material factual issues and proffers evidence that establishes a *prima facie* case for setting aside the election." *L.C. Cassidy & Son, Inc.* v. *NLRB*, 745 F.2d 1059, 1064 (7th Cir. 1984); see also Pet. App. A22-A23.

Petitioner does not challenge the standard governing its entitlement to an evidentiary hearing. Petitioner contends only (Pet. 15) that a hearing should have been held to judge the truthfulness of the particular statement at issue in this case because, if the statement was untrue, it was racially inflammatory. But the Board found, and the court of appeals agreed, that the nature and context of the union's statement showed that it was not racially inflammatory within the meaning of *Sewell*. See Pet. App. A30-A32. Petitioner presents no reason why this Court should reconsider that factual finding. Therefore, a hearing concerning the truth of the union's allegations was unnecessary: under the Board's general rules for assessing non-inflammatory statements, even if the statement was shown to be untrue, there would have been no grounds for setting aside the results of the election. See *Midland National Life Insurance Co.*, 263 N.L.R.B. at 133 (the Board does not "probe into the truth or falsity of the parties' campaign statements"); see also page 12, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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